

STATE OF MICHIGAN
COURT OF APPEALS

SADIE DAVIS, by her Next Friend PATRICK
DAVIS, and JACKIE DAVIS,

UNPUBLISHED
May 18, 2010

Plaintiffs-Appellants,

v

JAMES A. DAVID, D.D.S., d/b/a DAVID
DENTAL CLINIC, P.C.,

No. 290521
Macomb Circuit Court
LC No. 2007-001439-NH

Defendant-Appellee,

and

FRANK D. NAGY, D.D.S., and FRANK D.
NAGY, D.D.S., P.C.,

Defendants.

Before: MURPHY, C.J., and K.F. KELLY and STEPHENS, JJ.

PER CURIAM.

In this dental malpractice action, plaintiffs appeal by leave granted from a circuit court order granting summary disposition in favor of defendants James A. David, D.D.S. (“defendant”), d/b/a the David Dental Clinic, pursuant to MCR 2.116(C)(10) on the ground that plaintiffs’ expert witness was not qualified to testify against defendant pursuant to MCL 600.2169 because he was not a specialist in orthodontics, the specialty in which defendant was engaged at the time of the alleged malpractice. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a trial court’s decision on a motion for summary disposition, as well as issues of statutory interpretation. *Gonzalez v St John Hosp & Medical Ctr (On Reconsideration)*, 275 Mich App 290, 294; 739 NW2d 392 (2007). This Court reviews for an abuse of discretion a trial court’s ruling regarding the qualification of an expert witness to testify. *Id.* The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCL 600.2169(1) provides:

(1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:

(a) *If the party against whom or on whose behalf the testimony is offered is a specialist*, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

(b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.

(ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) *If the party against whom or on whose behalf the testimony is offered is a general practitioner*, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) Active clinical practice as a general practitioner.

(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed. [Emphasis added.]

Plaintiffs maintain that although orthodontics is a specialty and defendant was practicing within that specialty in his treatment of the patient when the alleged malpractice was committed, he was not a “specialist” within the meaning of MCL 600.2169. The trial court disagreed, reasoning that “the relevant inquiry is not whether he possessed a specialty license, but whether he was engaged in a specialty during the course of the alleged malpractice.” The trial court correctly noted that a licensed dentist who has not been issued a health professional specialty field license in orthodontics is not prohibited from performing services in that field. MCL 333.16608(3).

The trial court's approach is consistent with *Reeves v Carson City Hosp (On Remand)*, 274 Mich App 622; 736 NW2d 284 (2007). In that case, the defendant physician was board-certified in family medicine, but the alleged malpractice occurred while she was practicing emergency medicine. Although the plaintiffs' expert was board-certified in emergency medicine, the trial court determined he was not qualified because he was not board-certified in family medicine. This Court reversed, explaining that the physician was a "specialist" in emergency medicine because she was practicing emergency medicine at the time of the alleged malpractice and potentially could obtain a board certification in emergency medicine. *Id.* at 630.

This Court's decision in *Gonzalez*, 275 Mich App at 290, similarly indicates that the designation of "specialist" is based on practicing within a specialty, not completion of training or certification. In that case, the defendant-physician was a third-year surgical resident who was practicing general surgery at the time of the alleged malpractice. This Court explained that *Reeves* "teaches that if 'the specialty engaged in by the defendant physician during the course of the alleged malpractice' was outside the defendant physician's practice, that specialty is 'the one most relevant standard of practice or care.'" *Gonzalez*, 275 Mich App at 302. Although the defendant-physician was not board-certified in the challenged area of practice, he was practicing within a specialty and could potentially become board certified. Therefore, the plaintiff's expert was required to be a specialist or a board-certified specialist in the area of the specialty, which was general surgery. *Id.* at 303-304.

In the present case, the trial court correctly concluded that defendant was a "specialist" in orthodontics for purposes of MCL 600.2169. Although defendant did not have a specialty field license in orthodontics, the alleged malpractice occurred as he practiced in that specialty and 80 to 90 percent of his practice involved orthodontic work. Contrary to plaintiffs' contentions, the designation of "specialist" for purposes of the MCL 600.2169(1) does not depend on specialty licensing or certification. Because defendant was a "specialist" in orthodontics for purposes of MCL 600.2169(1), and plaintiffs' expert was not, plaintiffs' expert was not qualified to offer expert testimony regarding the appropriate standard of care for orthodontics. Accordingly, because plaintiffs were unable to offer expert testimony to support their claim against defendant, the trial court did not err in granting defendants summary disposition.

Affirmed.

/s/ William B. Murphy
/s/ Kirsten Frank Kelly
/s/ Cynthia Diane Stephens